NO. 04-456

IN THE

SUPREME COURT OF THE STATE OF MONTANA

M. ELIZABETH NELSON,

Plaintiff and Appellant,

vs.

ROBERT Y. NELSON,

Defendant and Respondent.

APPELLANT M. ELIZABETH NELSON'S APPELLATE BRIEF

ON APPEAL FROM THE MONTANA SIXTEENTH JUDICIAL DISTRICT,CUSTER COUNTY, DISTRICT COURT NO. DV 98-21580

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2. Did the District Court err in granting Robert Nelson's Motion in Limine and thus precluding testimony and evidence of injection of ovine ecthyma vaccine by Merle Nelson which action injured Bette Nelson?

3. Did the District Court err or abuse its discretion in granting Robert Nelson's Motion to preclude testimony and evidence by Bette Nelson's expert witnesses and by granting a directed verdict based upon inadequate disclosure of anticipated testimony and opinions of Bette's expert witnesses?

STATEMENT OF THE CASE

Plaintiff/Appellant brought this action in District Court for negligent application of herbicides and pesticides by Defendant/Respondent over a period of years and for negligent injection of ovine ecthyma vaccine into Plaintiff's hand during a sheep inoculation operation. The Court, on 9 November, 2000, entered summary judgment for Defendant on the grounds that the cause of action was barred by the statute of limitations. Plaintiff appealed. The Montana Supreme Court, on 2 July 2002, reversed the District Court and remanded the case for trial.

Upon remand, a scheduling calendar evolved on 20 August 2003 and trial was set for March 10, 2004. On 13 January, 2004, the District Court

granted Defendant's Motion for (partial) Summary Judgment which precluded evidence and testimony regarding the negligent supervision by Defendant Robert Y. Nelson as to acts of vaccine exposure caused upon Plaintiff Bette Nelson by Merle Nelson, father of Robert Nelson. By Memorandum and Order Granting Defendant's Motion In Limine, dated 5 February, 2004, the Court also granted the Defendant's Motion In Limine, determining that Plaintiff could not introduce evidence at trial concerning Plaintiff's exposure to Vaccine or any Chemicals caused by Merle.

Following jury selection and one day of trial, upon presentation by the Plaintiff, Bette Nelson, of expert witness Dr. Richard Nelson, Defendant Robert Nelson moved the Court for preclusion of Dr. Nelson's (and other expert witness testimony) due to an alleged failure of Plaintiff to comply with witness disclosure rules. Upon the Court's granting of that motion, Robert then moved for directed verdict. An Order Granting Directed Verdict and Verdict was issued orally and was formalized by document dated 16 March, 2004. Judgment was entered on 19 March, 2004. Notice of Entry of Judgment was distributed by Defendant on or about 22 March, 2004. Plaintiff appeals from these actions of the Court.

STATEMENT OF THE FACTS

M. Elizabeth "Bette" Nelson, lived, between 1984 and 1992, with Robert Y. Nelson, who was sole owner, operator and manager of a ranch operation in Garfield County, Montana. Trial Transcript (Trans.), p.219, 271. They married in 1986. Trans., p.147. They separated in 1992. Trans., p. 215. They divorced in 1996. Trans., p. 146. While Bette was assisting him, Robert managed the application of pesticides, herbicides and insecticides without application of proper methods. Trans., p. 240-241, 243-244. In addition, in 1989, while Bette was holding sheep, Robert's assistant, his father Merle, negligently caused Bette's hand to be injected with Ovine Ecthyma vaccine. Trans., p. 326. Over the course of the next five years while Robert continued to apply herbicides and pesticides, Bette's problems surfaced and multiplied, but doctors were unable to diagnose the cause or to provide a causal connection. Trans., p. 265-267. Ultimately, Bette's injuries became debilitating to the point of extreme and continual pain while doctors searched for the cause. Trans., p. 339-342. The injection occured in 1989. Trans., p. 331. Bette continued to live and work on the ranch under the same conditions, including improper use of pesticide protection on the ranch until her divorce from Robert in 1994. Trans., p. 236, 246-250. By May of 1995, Bette believed the cause of many of her health problems could stem from the herbicides, pesticides and insecticides. Trans., p. 337. Her medical

diagnosis was inconclusive at that time. Trans., p. 290. By April of 1995, Bette knew she had a number of diseases including obstructive lung disease, obstructive sleep apnea, pulmonary hypertension, seropositive rheumatoid arthritis, hypothyroidism, and depression. Trans., p.251, 332-333. The cause of those problems was not known. Trans., p. 337. It was not until 1995 that doctors suspected chemicals as the cause of those problems. Trans., p. 290, 337, 350. In May of 1996 Dr. Richard A. Nelson determined that toxic exposure to the nervous system associated with agricultural chemicals including herbicides, pesticides, and being directly injected with the vaccine for sore mouth disease in sheep (Ovina Ecthyma) was the probable cause of Bette's problems. Trans., p. 290; Complaint, p. 2. A copy of that medical diagnosis is attached hereto as Exhibit 4. Following substantial evaluation, in 1995 through 1998, including nerve damage exams, CT scans, specific consideration of pesticide, insecticide and Ovine Ecthyma effects, and examination by numerous physicians, and the University of Colorado Technology Unit, Bette Nelson filed her complaint for damage due to negligent application of pesticides, insecticides and herbicides and due to the negligent injection of the Ovine Ecthyma vaccine. Trans., p. 341-342; Complaint, p. 3.

STANDARD OF REVIEW

The Supreme Court reviews appeals from summary judgment rulings de novo. *Sleath v. West Mont Home Health Services*, 2000 MT 381, para. 19, 304 Mont. 1, para. 19, 16 P.3d 1042, para. 19. When the Supreme Court reviews a district court's grant of summary judgment, the Court applies the same evaluation that the district court uses, based on Rule 56, M.R.Civ.P. *Sleath*, para. 19. The inquiry is as follows:

> The movant must demonstrate that no genuine issues of material fact exist. Once this has been accomplished, the burden then shifts to the non-moving party to prove, by more than mere denial and speculation, that a genuine issue does exist. Having determined that genuine issues of fact do not exist, the court must then determine whether the moving party is entitled to judgment as a matter of law. We review the legal determinations made by a district court as to whether the court erred.

Sleath, para. 19, (citing *Oliver v. Stimson Lumber Co.*, 1999 MT 328, para. 21, 993 P.2d 11, para. 21. The Supreme Court reviews a district court's interpretation of law to determine if it is correct. *Steinback v. Bankers Life and Cas. Co.*, 2000 MT 316, para. 11, 302 Mont. 483, para. 11, 15 P.3d 872, para. 11.

Because issues of negligence ordinarily involve questions of fact, they are generally not susceptible to summary judgment and are properly left for a determination by the trier of fact at trial. *Kolar v. Bergo* (1996), 280 Mont.

262, 266, 929 P.2d 867, 869. Therefore, only when reasonable minds could not differ may questions of fact be determined as a matter of law. *Wiley v. City of Glendive* (1995), 272 Mont. 213, 217, 900 P.2d 310, 312.

A Motion In Limine is properly granted based upon relevancy, or irrelevancy, of evidence pursuant to Rule 403, M.R.Evid., which provides:

> **Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.**
> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 401, M.R. Evid., provides:

> **Definition of relevant evidence.**
> Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Relevant evidence may include evidence bearing upon the credibility of a witness or hearsay declarant.

The standard of review for a trial court's evidentiary rulings (such as preclusion of testimony and evidence from an expert witness) is to determine if the court abused its discretion and "we will not reverse evidentiary rulings absent a manifest abuse of discretion." *In Re A.N.*, 2000 MT 35, para. 22, 298 Mont. 237, para. 22, 995 P.2d 427, para. 22. The standard of review concerning a district court's ruling on a discovery matter is whether the

district court abused its discretion. *McKamey v. State* (1994), 268 Mont. 137, 145, 885 P.2d 515, 520.

The law does not favor directed verdicts. *Sweet v. Edmonds* (1976), 171 Mont. 106,109, 555 P.2d 504, 506. The district court may grant a directed verdict only when it appears that the nonmoving party cannot recover on any view of the evidence, including the legitimate inferences drawn from that evidence. *Barrett v. Larsen* (1993), 256 Mont. 330, 335, 846 P.2d 1012, 1016.

SUMMARY OF THE ARGUMENT

The false and misguided assumption made by the District Court that a partnership existed between Robert Nelson, land owner, and Bette Nelson, wife of Robert, permitted the Court to improperly conclude that Merle Nelson, the man who negligently administered the ovine ecthyma needle into Bette's hand, was not subject to Robert's supervision and that, therefore, evidence and testimony relating to actions of Merle could not be introduced. This led the Court to improperly grant partial summary judgment on that issue.

The Court erred and abused its discretion in granting a motion in limine which precluded Bette from introducing evidence and testimony

about the injection and resulting harm from the negligent injection of ovine ecthyma and its resulting harm to Bette because the evidence was relevant. It did not pose any risk of prejudice to Robert and could have been properly dealt with at trial by appropriate objection and determinations at that time. That evidence and testimony were crucial to a clear factual portrayal of the issue of negligence based upon the relationship and duties of the parties.

The District Court abused its discretion in permitting the preclusion of Bette's expert witnesses and their testimony because Bette had timely and adequately disclosed the information and substance of testimony and opinion of her experts as early as three years prior to trial. Robert then slept on his right to obtain additional discovery and then at trial surprised Bette and the Court with a misleading motion to preclude which resulted in the Court granting a directed verdict to the Defendant.

ARGUMENT

ISSUE 1: The District Court erred in granting (partial) summary judgment and precluding presentation of testimony and evidence of negligent supervison of Merle Nelson by Robert Y. Nelson, owner of the land where Plaintiff/Appellant Bette Nelson was injured.

Robert Y. Nelson claimed that the relationship he had with Bette in operating the ranch was a partnership. Bette Nelson disagrees in that she had no ownership or control of the ranch. Upon argument on the Motion For

Summary Judgment on January 6, 2004, Robert argued that he and Bette were in a partnership. In his Answers to Interrogatories, Request for Production #7, Robert Y. Nelson stated that there was no partnership. See Exhibit 1, which is attached hereto. In argument in briefs submitted in support of his motion for summary judgment and in oral argument on January 6, 2004, he stated both that there was a partnership and that there was not a partnership. During argument on the issue of summary judgment, he asserts:

> THE COURT: Let's say in a hypothetical it is a question of fact in a case like this as to whether a partnership existed.
> MR. MACKAY: Yes, Your Honor.
> THE COURT: All right. And you are saying that the depositions are clear—the statements already made are clear that there was no partnership?
> MR. MACKAY: That's correct.
> Hearing on Motions Trans., p.8, lines 16-23, Jan. 6, 2004.

In the same hearing, on the same date, at hearing on the issue of Defendant's Motion for Summary Judgment, Robert asserted the opposite:

> "Basically, Your Honor, the Plaintiff was in the driver's seat in the whole situation. Not only was she an equal partner, but the facts demonstrate that she was probably the controlling partner in this Montana partnership."
> Hearing on Motions Trans., p. 7, lines 1-4, Jan. 6, 2004.

The District Court recognized that "Robert's theory is that Robert had no duty to supervise (Elizabeth) because as a matter of Law, they operated

the ranch as a partnership." Order and Memorandum Regarding Defendant's Motion For Summary Judgment, (p. 6, line 11-12). Exhibit 2. In addition, Robert's Reply Brief In Support of Defendant's Motion For Summary Judgment states that:

> "It is clear from the testimony cited in Robert's Brief that Plaintiff and Robert were operating a business for profit as a Montana general partnership." P. 7, lines 11-13.

Clearly, the issue of partnership would have to be settled at trial. If there was no partnership and the ranch was a sole proprietorship then the duties of Robert, the owner, are different towards others on the ranch than they would be if it is a partnership for which Bette would be jointly liable on duties and responsibilities. Bette testified that there was no partnership and that she was simply the wife of Robert. The Complaint alleges that Robert negligently supervised Merle with respect to the vaccine injection incident. Complaint, VIII. Robert argued that he had no control over Merle and therefore no duty to supervise Merle. Bette argued (and testified) that she did not own or control the land or the ranch operations and that Robert did. It is clear that Merle was working for someone who had authority to supervise him when he caused the injury to Bette. If there was no partnership, and Bette worked at the ranch with Robert simply as a wife, then there was a special duty of care which Robert had towards Bette and to

others. That duty of care included assuring that others on the ranch, under the invitation or supervision of the owner, would not injure others, including Bette.

A possessor of premises has a duty to use ordinary care in maintaining his premises in a reasonably safe condition and to warn of any hidden or lurking dangers. What constitutes a reasonably safe premises is generally considered to be a question of fact. *Richardson v. Corvallis Pub. School Dist.*, 286 Mont. 309, 950 P.2d 748 (1997). In effect, then, the conditions created by Robert Nelson on his ranch are questions of fact. The owner of a premises has a duty to exercise ordinary care in management of the premises to avoid exposing persons thereon to unreasonable risk of harm regardless of the person's status. *Limberhand v. Big Ditch Co.*, 218 Mont. 132, 706 P.2d 491 (1985). All persons owe a duty to the world at large to act reasonably in order to prevent injury to their fellow [human beings]. *Sizemore v. Montana Power Co.*, 246 Mont. 37, 46, 803 P.2d 629, 635 (1990). Robert Nelson had a duty to exercise care in choosing who could help him inoculate sheep. Whether he chose wisely or properly supervised Merle, then, is a question of fact for the jury. In addition, when two people live together under one roof, they owe each other the same personal relationship duty as found between spouses. *State v. Kuntz*, 995 P.2d 951 (MT 2000). Thus, since Robert was

married to Bette, he owed her both a ordinary man's duty and a special relationship duty to protect her from risk of harm on his ranch, including improper application of sheep injections and improper application of chemicals to the ranch.

Robert Nelson, as owner of the land and of the ranch operations, before, during and after the marriage of the parties had complete control of the ranch operations, including who injected sheep, who applied chemicals on the ranch, who helped on the ranch, setting methods of protection from harm and in making daily decisions regarding the ranch. Whether there was a partnership was a question of fact for the jury. Together with that issue is the issue of the extent of supervision and duties of care the land and ranch owner has over people who enter, reside on, or work on that ranch. This includes the supervision authority over his own wife and over Merle Nelson, Robert's father, who negligently applied the injection into Bette Nelson's hand.

The District Court determined that as a matter of law there was no supervision duty by Robert Nelson as it related to his father, Merle Nelson. This decision was made although it was clear from briefs, affidavits and argument that Bette was not a partner in the ranch and could not have control over others who helped on the ranch, including Merle. The Court

bypassed the issue of partnership and duties of care as it relates to Robert's control of actions on the ranch and as it relates to Robert's control of what actions were performed by Merle on the ranch. It was imperative that a decision be made about the partnership issue prior to a determination that Merle was not subject to Robert's supervision. If there was a partnership, then clearly Bette would have had some voice in authority and control and supervision of Merle. If there was no partnership then someone, and, in this case, only Robert could control and supervise Merle. Once the factual issue of existence or non-existence of a partnership was raised, the duties relating to that partnership were also raised and legitimate questions were presented for the jury to decide. Only when the facts are undisputed or susceptible to only one inference, is the question of whether a partnership exists one of law for the court. *In re Estate of Bollinger*, 971 P.2d 767 (Mont. 1998). Since partnership was a factual issue and because it was disputed and susceptible to more than one inference, it was incumbant upon the court to let that factual issue go to the jury before the court made decisions about the duties that related to the partnership issue. The extent of duty or lack of duty could then be given to the jury in the form of instructions by the Court. Clearly, the Court erred in its determination that there was no supervisory duty without first letting the jury determine whether there was, in fact, a

partnership. The Court was premature in its decision about duties and thus, improperly eliminated the opportunity for Bette to prove the extent of the causes of her injury. If there was no partnership and it was a sole proprietorship as Robert testified to at trial (Trial Trans., p.164, lines 22-24) then clearly the Court was wrong in granting summary judgment as to the negligent supervision issue since the workers on Robert's land must conform to safety obligations that Robert must meet. Obviously, reasonable minds could differ as to the relationship of the parties and resulting duties and, thus, the questions of duty relating to that relationship could not be determined as a matter of law as it was. The issue of partnership was a matter for the jury, and not for the Court, to decide, particularly by this back door method. By declaring and limiting the duty of Robert as it relates to Merle and Bette, the Court implicitly ruled that there was a partnership, and not a sole proprietorship and that Robert did not supervise Merle. Only after submittal of the partnership issue to the jury could issues of duty or supervision be determined since duties to be considered were dependent upon the type of relationships that existed between the parties.

The issue of negligent supervision as to Merle inherently relates to other acts of negligence and the resulting injury to Bette, stemming from the injection of ovine ecthyma and the continuing improper application of

chemicals including herbicides, insecticides and pesticides. Because issues of negligence ordinarily involve questions of fact, they are generally not susceptible to summary judgment and are properly left for a determination by the trier of fact at trial. *Kolar v. Bergo* (1996), 280 Mont. 262, 266, 929 P.2d 867, 869. The summary judgment which served to preclude evidence and testimony pertaining to injuries arising out of the actions of Merle was in error.

In addition, in Montana, a duty is imposed by statute on all persons to avoid negligently causing the death of "another human being." Mont. Code Ann. Sec. 45-5-104. Although Bette is still alive, she has filed an action and allegations as to injury which may still result in her early demise. She has alleged actions by Merle, of negligence and resulting life-threatening injuries. Certainly the alleged injuries, their cause and a determination of who is responsible for those injuries are relevant to the issue of negligence resulting in injury. It is certainly an appropriate question of fact as to what a reasonable person should do to prevent a negligent injection of ovine ecthyma on a ranch during sheep injection processes. It is certainly relevant as to what the relationships are between the parties at the time such an event occurs, including the extent of duty and responsibility Robert has for

Merle's actions. These are questions of fact for the jury and they are not subject to a summary judgment motion.

ISSUE 2: The District Court erred in granting Robert Nelson's Motion in Limine and thus precluding testimony and evidence of injection of ovine ecthyma vaccine by Merle Nelson which action injured Bette Nelson.

It is the trial court's inherent power to manage the courtroom to ensure a fair trial, including the authority to grant motions in limine. *Luce v. United States*, 469 U.S. 38, 41 n. 4 (1984). When a court is presented with a motion in limine, the court is required to decide whether to grant or deny the motion at that time or whether to reserve the matter to be handled at trial. When the matter is clearly admissible or clearly inadmissible, the court will normally rule before trial. When the admissibility of the evidence depends upon developments during trial the court should wait until trial to rule. A motion in limine should be granted (only) when the evidence in question is clearly inadmissible. *Hawthorne Partners v. AT&T Technologies, Inc.,* 831 F. Supp 1398, 1400 (1993). Evidentiary rulings should be deferred until trial so that questions of foundation, relevancy and potential prejudice may be resolved in the proper context. Id.

In it's Memorandum and Order Granting Defendant's Motion In Limine, the District Court determined that because Robert Nelson had no

duty to supervise Merle Nelson, evidence of vaccine exposure is irrelevant since the exposure was inflicted by Merle Nelson's injection of Bette with the ovine ecthyma vaccine. See Exhibit 3. The Court determined that pursuant to Rule 401 M.R.Evid., Bette could not introduce evidence pertaining to injuries arising out of the actions of Merle.

Even if Robert had no duty to supervise Merle, the ovine ecthyma injection event that transpired on the ranch during the operations, which included Bette and her alleged injuries, is relevant to the issues of negligence as it relates to Bette's claim against Robert. In conformance with Rule 401 M.R.Evid., the evidence of the occurrences relating to Merle's actions was relevant evidence having a tendency to make the existence of facts that are of consequence to the determination of the action more probable or less probable than it would be without the evidence. Testimony and evidence as to cause and extent of injury would be insufficient and confusing without a complete portrayal of all of the facts, including the injection and its effects. The Court erred in its blanket exclusion of all evidence at trial concerning Plaintiff' (Bette's) exposure to Vaccine or any Chemicals caused by Merle.

There are measures short of complete exclusion if a court is concerned about the prejudicial impact of evidence or testimony. If there is any question of unfair prejudice or confusion of the jury, the Court can admit the

evidence and take necessary precautions by giving a contemporaneous instruction to the jury, followed by additional admonitions in the charge before the case is given to the jury for deliberations. 2 Weinstein's Federal Evidence, para. 403.02[2][c], at 403-16 (2d ed. 2003). In addition, properly drafted jury instruction(s) at trial could prevent unfair prejudice, confusion of the issues, or misleading of the jury. Also, Court rulings, as appropriate at trial, could prevent undue delay, waste of time, or needless presentation of cumulative evidence relating to the incidents which involved Merle Nelson. As it occurred, the Court's granting of the motion in limine simply permitted an overly broad, shotgun approach which was designed and, in effect, served to obstruct Bette's presentation of the facts relating to her claims.

With respect to Merle, this determination of irrelevancy hinges upon the prior determination that Merle was not subject to the supervision of Robert, the ranch owner. Robert's relationship to Bette and his relationship, including duties of care and supervision, are relevant and so are the form and substance of the alleged negligence, regardless of the type of chemical involved. It is not irrelevant that Bette was injured by Merle's actions, whether supervised by Robert or not, because the events occurred on the Robert Nelson ranch and the Court and jury are entitled to hear the facts as to the nature and extent of the incidents which caused the alleged injury.

This conclusion of irrelevancy is also incorrect and an abuse of discretion for the reasons stated hereinabove as to Issue Number 1. Decisions of irrelevancy that stem from an improper conclusion that there was no duty of supervision because there was a partnership would clearly be in error since that issue of partnership had not yet made its way into the hands of the jury.

ISSUE 3: The District Court erred in granting Robert Nelson's Motion to preclude testimony and evidence by Bette Nelson's expert witnesses and by granting a directed verdict based upon inadequate disclosure of anticipated testimony and opinions of Bette's expert witnesses.

This case went to the Montana Supreme Court on the issue of statute of limitations in March of 2001. Attached to the brief were exhibits which included three reports of Dr. Richard A. Nelson, M.D., which diagnosed and explained the substance and cause of Bette Nelson's debilitating physical conditions. Those detailed reports are attached hereto as Exhibits 4, 5, 6, and 7. Also attached to that brief of 2001 were the reports of Dr. Bruce R. Swarney, M.D., which also diagnosed and explained the substance and cause of Bette Nelson's problems. Those reports are attached hereto as Exhibits 8 and 9. At the time of the prior appeal to the Supreme Court, the Defendant, Robert Nelson, knew who Bette's witnesses were and what their testimony

and opinion would be. In August of 1998, Bette submitted all medical reports, including those of Doctors Nelson and Swarny, to Robert's attorney. Bette summarized and provided the documents which are the basis of medical opinions of her experts in Response to Request For Production # 2 together with response to Interrogatory # 4 responses (list of witnesses) on 5 August, 1998. In RFP #2 Bette referred to and provided copies of all medical reports and doctor reports including Dr. Kasnett, Dr. Richard A. Nelson, Marla Malley, PAC, Dr. Swarny, and Dr. Scott. See attached Exhibit 10, p.2-3. Aside from providing the substantive reports, Bette supplied the names and addresses of these potential providers. See Exhibit 10, p.4. In addition, Bette supplied numerous responses (in 1998) for the basis of opinions about chemicals and ovine ecthyma as the cause of her health problems. See Answers to Interrogatory #7, p. 5-6 and Answer to RFP # 7, referencing Interrogatory #4. She also provided reports of Dr. Mehr and Dr. Harrison which Dr. Nelson considered in his opinion together with the original Dr. Nelson reports (letters and records) and medical reports and charts. See Exhibit 11. In light of all the expert witness information supplied in 1998 and subsequently, it is remarkable, now, that Robert would claim to be surprised and claim that the disclosure of witnesses was inadequate. Bette could not be reasonably expected to rewrite the reports of

the doctors. Bette had provided all Dr. Nelson and Dr. Swarney reports and conclusions to Robert prior to his original motion for summary judgment which was presented to the district court in September of 2000. Perhaps it is worth noting that after that appeal, Robert switched attorneys and may have failed to present a complete file to his new attorneys (although just prior to trial in 2004, Robert again retained Mr. Corbin to assist the new attorneys). In Plaintiff's (Bette's) Responses to Defendant's Second Discovery Requests, dated February 2003, Bette again indicated who her expert witnesses would be, together with their addresses and references to the reports which were already in Robert's possession per prior discovery requests. On 3 June 2003, nine months before the scheduled trial, Plaintiff's Disclosure of Experts (copy on file) listed Dr. Richard A. Nelson and Dr. Bruce Swarny and their addresses, their professions, what they would testify about, their opinions as to the cause of injury to Bette Nelson, the extent of their own examination and treatment of Bette Nelson and, their knowledge and review of records of other professionals who examined Bette Nelson. A copy of the Plaintiff's Disclosure of Experts is attached as Exhibit 12. On September 23, 2003 Bette submitted her responses to Defendant's Supplemental Discovery Requests. See Exhibit 13, which is attached. It is clear from a review of the inquiry made by Defendant then that they were no

longer concerned about the substance of expert testimony other than the types of chemicals claimed as cause of Bette's problems. Robert waited until March 4, 2004, after discovery was over and just a few weeks prior to trial to depose his own rebuttal witness although Robert never did depose Bette's expert witnesses. Robert cannot legitimately claim, now, that he was not fully aware of the expert testimony and opinions which were to be expressed at trial or that Bette did not comply with defendant's discovery requests.

The District Court abused its discretion by precluding the expert witnesses of Plaintiff/Appellant Bette Nelson from testifying because there had been adequate disclosure of expert witnesses by pleadings and communication, including a prior Supreme Court appeal and reversal in the same case, interrogatory responses, communications between the parties, and the pretrial order. In Montana, case law makes clear that it is proper to allow the testimony, even of an undisclosed expert if the opposing side has had sufficient opportunity to prepare for the testimony of the witness(s). The Montana Court has held that when a witness, even an expert, was disclosed and available for deposition, it is not error to allow him/her to testify. *Morning Star Enterprises v. R.H. Grover,* (1990) 247 Mont. 105, 110, 805 P.2d 553, 556. Here, it is remarkable that Robert Nelson knew

about the experts of Bette Nelson, especially Dr. Richard A. Nelson and Dr. Bruce Swarny, since prior to the first trip to the Supreme Court (See Exhibits therein) and discussed the experts prior to and during the whole of this case over the past four years, and now claims inadequate notice as to those expert witnesses. This is especially true, since Defendant Robert Nelson listed "All witnesses listed by Plaintiff" as witnesses of Defendant in the pretrial order. Page 5, Pretrial Order, line 21, Exhibit 14, attached. The proper recourse may have been a continuance to allow (Robert Nelson) additional time to prepare for what he began on the day of trial claiming was undisclosed expert witnesses. *Mason v. Ditzel* (1992) 255 Mont. 364, 370, 842 P.2d 707, 712.

At side bar on the second day of trial, at the time of Robert's Motion to exclude expert testimony, the Judge asked Robert's attorney "Why wasn't this presented prior?" then he decided to go on record. It became clear that the Court had some concern then about the timeliness of the motion. This is especially important because the time for filing and argument of motions had expired prior to trial on 2 February, 2004, pursuant to the scheduling order of 20 August, 2003. See Exhibit 15, attached. Yet Robert waited until the second morning of trial to present what appeared to be a motion and brief he had prepared prior to trial. Obviously the effect was to surprise not only

Bette then, but also the Court. This afforded Bette (and the Court) no reasonable opportunity to research, to contemplate or to effectively and fairly determine any response or decision. If the Court had time to read the motion and brief, it certainly did not have time to contemplate it prior to a decision that morning. A Motion for Directed Verdict followed immediately.

The underlying policies of Rule 26, M.R.Civ.P., are to eliminate surprise and to promote cross-examination of expert witnesses. *Smith v. Butte-Silver Bow County* (1996), 276 Mont. 329, 333, 916 P.2d 91, 93. Rule 26(b)(4)(A) and (B), M.R.Civ.P. are designed to encourage the completion of trial on the merits, not to discourage it, as has been accomplished by Robert Nelson. In addition, failure to properly answer certain interrogatories will not be deemed in every case to effect censure of material which should rightfully be developed in a trial on the merits. *Wolfe v. Northern Pacific Ry. Co.*, 147 Mont. 29, 409 P.2d 528 (1966). In *Wolfe*, the Court also noted that..."a strict rule of exclusion could in many instances defeat the desired goal of a decision on the merits." *Wolfe*, 147 Mont. 29, 40-41, 409 P.2d 528, 534. The rules provide for recourse other than dismissal if a party feels, prior to trial that disclosure is inadequate. In a

similar, but non-precedent case in the Workers Comp Court in Montana, the Judge summarized the options available in the "non-disclosure" case:

> "In determining whether to exclude testimony based upon a failure to properly and fully answer an interrogatory, the Court must consider whether the proposed testimony is surprising and would put the party opposing the testimony at an unfair advantage.
>
> "ASARCO's attorney could have picked up the telephone and asked for more information regarding claimant's expert witness, or sought to depose the experts, or moved to compel further answers. He could have moved to continue the trial to a later date if need be." *Darrah v Asarco, Inc.*, 2001 MTWCC 17A, WCC No. 2000-0249, para. 11-12.

Robert's attorney and Robert, knowing of Dr. Nelson's and Dr. Swarney's anticipated testimony, could have picked up the phone, could have deposed the expert witnesses, and could have moved to compel further answers. He could have moved for a continuance. He could have noticed the motion up for hearing on the scheduled last motion date prior to trial. He could have simply gone to trial and presented his rebuttal witness testimony which he had already made arrangements for. Instead, he feigned surprise as a basis for his motion to preclude. Robert does not have clean hands! This is a case of the kettle calling the pot black. It was unclean and improper for Robert Nelson to limit his pretrial discovery and not request further expert witness information, to depose his own expert witness beyond the scheduling order deadline, and to then request the sanction of preclusion and

dismissal here based upon that rule, and it was an abuse of discretion for the district court to grant that motion to preclude expert witnesses (and for directed verdict) when numerous more appropriate options were available.

The issue presented here is not new to the Montana Supreme Court:

> "We examined Rule 26(b)(4)(A)(i), M.R.Civ.P., in *Scott v. E.I. Dupont De Nemours & Co.,* (1989), 240 Mont. 282, 783 P.2d 938. In Scott, the plaintiff asserted that the defendant failed to adequately answer discovery requests regarding its expert witness. *Scott*, 240 Mont. At 286, 783 P.2d at 941. The answers provided by the defendant were very brief. This Court analyzed the Defendant's answers and noted that "[w]hile the answers were not as complete as they should have been, [the expert] was not a surprise witness." *Scott*, 240 Mont. At 286, 783 P.2d at 941. We further noted that while "we do not condone defendant's failure to provide full and complete answers to interrogatories," refusing to allow the expert to testify "would have been an extreme sanction, given that the defendant's offense was incompleteness in its answers to interrogatories, not failure to answer." *Scott*, 240 Mont. At 287, 783 P.2d at 941. Therefore, we held that the District Court did not err in permitting the expert witness to testify at trial. *Scott*, 240 Mont. At 287, 783 P.2d at 941.

The case at hand is similar to the case of *Scott*. Here, the Plaintiff/Appellant Bette Nelson asserts that it was an abuse of discretion to preclude the expert witnesses, whereas in *Scott* the Plaintiff asserted that it was an abuse of discretion for the Court to permit the testimony of the expert witnesses. The reasoning of the Court, for purposes of consistency, must be that the extreme sanction of dismissal would be an abuse of discretion when incompleteness of responses becomes an issue. In the case at hand the

Defendant, Robert Nelson, was not limited in his ability to cross-examine the plaintiff's witnesses. By listing all of Plaintiff's witnesses as his own witnesses in the pretrial order Robert acknowledged that he knew of Dr. Nelson's and Dr. Swarny's anticipated testimony. In fact, Robert Nelson, only a month prior to trial, conducted a deposition of it's own expert witness, Dr. Patrick Cahill, Neurologist, in order to prepare for rebuttal of Dr. Richard Nelson and Dr. Bruce Swarny's anticipated testimony and opinions. Dr. Cahill was also listed in the pretrial order as a witness for Robert Nelson.

In another case, *Hawkins v. Harney*, 2003 MT 58, the Montana Supreme Court addressed this issue by further clarification of the purpose of Rule 26:

> Para. 26 "As we noted above, the underlying policies of Rule 26, M.R.Civ.P., are to eliminate surprise and to promote effective cross-examination of expert witnesses. *Smith*, 276 Mont. At 333, , 916 P.2d at 93. While this Court does not condone the brevity of Hawkins' supplemental answer, we conclude that her answer provided the Respondents with a sufficient indication of the substance of Dr. Collin's testimony so as to eliminate the possibility of surprise and promote effective cross-examination. That is, Hawkins' supplemental answer eliminated the possibility that Dr. Collins would be a surprise witness, and it provided sufficient information regarding Dr. Collins to allow the Respondents to prepare for cross-examination."
>
> Para. 27 "We further note that while we do not condone Hawkins' tardiness in answering the Respondents'

> interrogatories, such tardiness did not prejudice the Respondents. At the time the Respondents received Hawkins' supplemental answer, the case had yet to be scheduled for trial. Consequently, the Respondents would have had adequate time to prepare their cross-examination of Dr. Collins. See *Scott*, 240 Mont. At 287, 783 P.2d at 941(stating that the elapse of time lessens the importance of inadequate answers to discovery requests). Additionally, the Respondents could have elected to depose Dr. Collins at some time prior to trial in order to elicit further information regarding his anticipated testimony. Therefore, we hold that Hawkins' supplemental answer to the Respondent's interrogatory was sufficient to meet the policies underlying Rule 26, M.R.Civ.P., and as such, we further hold that the District Court abused its discretion when it determined that Hawkins did not provide an adequate response."

This case is almost squarely on all fours with *Hawkins*. This case was dismissed for failure to comply with Rule 26 when the disclosure of expert witnesses initially occurred almost four years before the trial and continued, and thus was adequate. Any incompleteness of responses to interrogatories could have been cured here. Here, Robert was prepared to cross examine. He had a rebuttal witness ready. He knew the substance of Bette's expert witness testimony. Robert would not have been prejudiced in any way by the testimony of those expert witnesses. Robert had three years to depose Bette's witnesses, yet chose not to. Robert had three years to prepare his cross examination. In light of these facts, it is clear that the District Court, in dismissing the case, acted arbitrarily without conscientious judgment and exceeded the bounds of reason. It was Bette, not Robert who was caught by

surprise, because the Court permitted the exclusion of experts who had not been timely objected to prior to trial. For all of these reasons, together with the fact that policy requisites were met by Bette, who did comply with Rule 26, it is clear that the District Court abused its discretion when it sanctioned Bette Nelson and dismissed her case. The District Court's decisions to exclude Bette's expert witnesses and to dismiss the case constitutes an abuse of discretion that materially affected Bette's substantial rights to a trial on the merits and prevented her from having a fair trial.

The directed verdict evolved from this abuse of discretion, particularly as to cause and effect resulting in injury. Because Bette's witnesses were precluded from presenting the testimony and evidence necessary to show the actions of Robert Nelson as the cause of Bette's medical problems, a misguided directed verdict followed. The improper preclusion of expert witness testimony and evidence "gutted" the cause element of Bette's negligence claim culminating in the Court's additional abuse of discretion and misapplication of the law. The Court ignored the fact that these same witnesses were listed on Robert's list of witnesses; ignored the fact that Robert had his rebuttal witness(es) prepared; ignored the fact that Robert previously had the detailed reports and evidence of the expert witnesses because he had been to the Supreme Court three years earlier on the statute

of limitations issue, including a discovery date of opinion as to cause and effect as the determining factor in the Supreme Court; and, ignored the many options available to the court short of the extreme sanction of dismissal.

CONCLUSION

There are clearly significant, numerous and substantial issues of material fact which preclude the granting of partial summary judgment in this case. The District Court erred in granting (partial) summary judgment to Robert Nelson based upon the conclusion that Robert Nelson did not have supervisory authority over Merle. The ruling of summary judgment must be reversed and the case remanded to trial, permitting the introduction of evidence and testimony regarding the relationship of the parties and of Merle Nelson and the duties of a landowner to all who work or live on his property.

The Court erred in its preclusion of evidence and testimony relating to the ovine ecthyma injection. The Court ruling must be reversed and the facts and issues relating to negligent injection must be permitted on retrial.

The Court abused its discretion as to the preclusion of Bette's expert witness testimony and evidence and the case must be remanded for trial, to include permitting Bette's expert witnesses to testify due to Bette's compliance with Rule 26 disclosure.

Plaintiff, Bette Nelson, is entitled to her day in court.

RESPECTFULLY SUBMITTED this 16th day of August, 2004.

Robert E. LaFountain
Attorney for Plaintiff/Appellant

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Time New Roman text typeface of 14 points, does not exceed 30 pages, is double spaced, Microsoft Word for Windows, is not more than 10,000 words, and is not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

DATED this 16th day of August, 2004.

Robert E. LaFountain
Attorney for Plaintiff/Appellant

CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing, Appellant's Brief was duly served on counsel of record at the address listed below by U.S. mail, postage prepaid, the 16th day of August, 2004 and the revised brief was duly served on the 21 ST day of August, 2004 to:

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MONTANA SIXTEENTH JUDICIAL DISTRICT COURT, CUSTER COUNTY

M. ELIZABETH NELSON, Plaintiff, -vs- **ROBERT Y. NELSON,** Defendant.	**Cause No. DV 98-21580**

ANSWERS TO PLAINTIFF'S FIRST INTERROGATORIES, REQUEST FOR PRODUCTION AND REQUESTS FOR ADMISSIONS TO DEFENDANT

COMES NOW, the Defendant, **ROBERT Y. NELSON**, and answers Plaintiff;s First Interrogatories, Requests for Production and Requests for Admission as follows:

INTERROGATORY NO. 1: Describe your personal and business relationship to Merle Edward Nelson in July of 1989:

ANSWER: Merle Nelson was my father. We had no professional relationship.

INTERROGATORY NO. 2: Describe your personal and business

Ex 14

should if any checks be found they will be forwarded on to you.

REQUEST FOR PRODUCTION NO. 7: Please produce a copy of any documents which relate to the status of your farm/ranch as a corporate or partnership business between 1986 and 1994.

ANSWER: Mr. Nelson's ranch was a sole proprietorship, not a partnership, nor a corporation.

REQUEST FOR PRODUCTION NO. 8: If your farm/ranch operated as a partnership between 1986 and 1994 please produce and provide a list of any and all partners and their percentage of interest in the operation.

ANSWER: See answer number seven.

REQUEST FOR PRODUCTION NO. 9: If you farm/ranch operated as a corporation please produce and provide a list of all corporate officers and the name, address, and telephone number of the agent listed for service of process.

ANSWER: See answer number seven.

REQUEST FOR PRODUCTION NO. 10: Please produce and provide the names, address, and telephone numbers of any and all persons to whom you have transferred any real property since 1986.

The ANSWERS which I have given to the foregoing Interrogatories and Requests are true, correct and complete to the best of my knowledge and belief.

DATED this 23rd day of April, 1999.

Robert Y Nelson
ROBERT Y. NELSON

SUBSCRIBED AND SWORN TO before me this 23rd day of April, 1999.

Kathy A. Furman
Notary Public for the State of Montana
Residing at: Miles City
My Commission Expires: 1-27-99

(Notarial Seal)

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MONTANA SIXTEENTH JUDICIAL DISTRICT COURT
CUSTER COUNTY

M. Elizabeth Nelson, Plaintiff, vs. **Robert Y. Nelson,** Defendant.	Cause No. DV 98-21580 *Judge Gary L. Day* ***ORDER AND MEMORANDUM REGARDING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT***

This matter came on for hearing before me on January 6, 2204, on the motion of Robert Y. Nelson, Defendant in the above-entitled action, for summary judgment pursuant to Rule 56, Montana Rules of Civil Procedure. Robert E. LaFountain appeared as attorney for M. Elizabeth Nelson, and Plaintiff was present in the courtroom. Thomas A. Mackay appeared as attorney for Robert Y. Nelson.

The Defendant filed the present Motion for Summary Judgment, together with a supporting brief. The Plaintiff filed a response brief on October 21, 2003, and the Defendant filed a reply brief on November 6, 2003. The matter is deemed submitted and the Court issues the following Order and Memorandum.

ORDER

IT IS HEREBY ORDERED that the Defendant's motion for summary judgment against the Plaintiff be, and it hereby is, GRANTED on the issue of negligent supervision of Merle Nelson, and DENIED as to all other grounds raised in the present motion, and that partial summary judgment be entered in favor of the Defendant, Robert Y. Nelson, and against the Plaintiff, M. Elizabeth Nelson as herein ordered.

EXH
2

MEMORANDUM

I. Factual and Procedural Background.

On May 14, 1998, M. Elizabeth Nelson ("Elizabeth") filed a personal injury lawsuit against her former husband, Robert Y. Nelson ("Robert"). Elizabeth assisted Robert with ranching activities on a regular basis from 1989 until their divorce proceedings began in 1994. Elizabeth alleges that from 1989 to 1994, due to Robert's negligence, she was exposed to dangerous chemicals while working on the ranch. In addition, in July 1989, while Elizabeth was holding a sheep in preparation for inoculation, Robert's father, Merle Nelson ("Merle") accidentally injected Elizabeth's hand with a vaccine containing the live virus for sore mouth disease. As to this event, Elizabeth alleges that Robert was negligent in his supervision of Merle. From 1989 through 1998, when the Complaint was filed, Elizabeth suffered from numerous physical ailments that either surfaced or worsened after her exposure to the chemicals and vaccine.

On September 7, 2000, Robert filed a motion for summary judgement, arguing that Elizabeth's cause of action was barred by the three-year statute of limitations. This Court found that Elizabeth sustained "obviously tortious" injuries when she was accidentally injected with vaccine, and, therefore, that her claim accrued in July 1989. Accordingly, by Order filed November 9, 2000, this Court granted Robert's motion for summary judgment. Elizabeth appealed that Order.

On appeal, Elizabeth argued that under the "discovery rule," her claim did not accrue until her illness was causally connected to the chemicals and vaccine by a May 20, 1996 medical diagnosis.[1] Robert argued in agreement with the District Court, that the injury was obviously tortious. Alternatively, Robert argued that for purposes of application of the "discovery rule," the requisite causal connection was established as early as May 10, 1995, as evidenced by averments made by Elizabeth in a motion for modification of the Nelson's separation agreement. The Montana Supreme Court reversed the District Court's order and held that Elizabeth's claim accrued as of the May 20, 1996 diagnosis and was therefore filed within the applicable statute of limitations. *Nelson v. Nelson*, 50 P.3d 139 (Mont. 2002)("Nelson I").

The majority and dissenting opinions in Nelson I also addressed the merits of applying the doctrine of judicial estoppel, an argument not presented by Robert in his motion or on appeal. The majority opinion found that the doctrine did not apply. After Nelson I, Robert filed a motion with this Court for leave to file an amended answer to include the additional defense of judicial estoppel. That motion was granted by an Order filed January 17, 2003. On the same date, Robert filed an

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[1]Section 27-2-102, MCA provides that if the facts constituting an injury are self-concealing, "[t]he period of limitation does not begin on [the tort action] until the facts constituting the claim have been discovered or, in the exercise of due diligence, should have been discovered by the injured party."

amended answer that included judicial estoppel as a defense.

Currently before the court is Robert's second motion for summary judgment. Robert argues that his motion should be granted on the following grounds: (1) that Elizabeth's claim is time barred by the statute of limitations; (2) that Elizabeth's claim should be barred by application of the doctrines of waiver and judicial estoppel; (3) that there is no genuine issue of material fact as to Robert's duty to supervise Merle; and (4) that there is no genuine issue of material fact as to Robert's duty to supervise Elizabeth.

II. Law and Discussion.

A. Statute of Limitations and Application of the "Discovery Rule."

The issue decided by the Montana Supreme Court in Nelson I was whether, based on the facts then in evidence, Elizabeth's lawsuit was filed within the applicable statute of limitations. In other words, the ruling does not apply generally to all potential challenges based on the statute of limitations. The present motion does not raise an issue previously disposed of by Nelson I, and the matter is appropriate for this Court's consideration.

Robert argues that, as a matter of law, "new evidence" establishes that Elizabeth's claim accrued when she discovered the causal connection between her illness and injury more than three years before she filed suit. This "new evidence" consists of a letter and explanatory statement thereof via an interrogatory answer – evidence that Elizabeth concedes was made available to Robert during discovery subsequent to Nelson I. Sum. J. Hear. (Jan. 6, 2004). Robert's argument based on the statute of limitation is analogous to that presented in Nelson I, and is subject to a similar analysis.

1. Nelson I - Evidence in Support of Robert's Statute of Limitation Argument.

In Nelson I, Robert's argument was based on the following language found in Elizabeth's motion for modification of the parties' separation agreement:

> After entering into the Separation Agreement, the doctors now believe that the cause of [Elizabeth's] problem may very well stem from certain poisons used on the ranch.
>
> * * *
>
> The injuries suffered as a result of improper use of these chemicals . . . constitute a life threatening and life long problem . . . .

The Montana Supreme Court found these statements to be "speculation" that did not "definitively [establish] Elizabeth's knowledge of the causal connection between her injuries and the injection."

Nelson I at ¶ 23.[2] Instead, the Court found the requisite causal connection occurred on May 20, 1996, when a neurologist, Dr. Nelson, linked Elizabeth's illness and her injury in his diagnosis. In addition, the Court noted an August 11, 1995 report from another physician, Dr. Scott, indicating that doctors were still uncertain as to the "cause and effect" relationship of Elizabeth's illness and injury. *Id.*

2. Present Motion - Evidence in Support of Robert's Statute of Limitations Argument.

Robert's present motion is based on "new evidence." In a letter dated July 26, 1994, Elizabeth stated as follows:

> . . . the blood test that [the doctor] had to send away came back positive!
>
> * * *
>
> . . . Now the Doctor's [sic] and my lawyer know's [sic] for sure that I wasn't putting on like you would like for them to believe, but I really am sorry about the cost.

Elizabeth further explained the above-quoted statement as follows:

> Interrogatory No. 13. Please identify the parties referenced and explain in detail statements you made in [the letter] concerning a blood test ordered by a doctor that came back positive. . . .
>
> Response to Interrogatory No. 13. Dr. Nelson sent me to Nebraska to a hospital where radioactive dye was administered.[3] This was to evaluate whether there was poison in my system. Dr. Nelson may have this information. I have not been able to locate my copy. I tested positive for poisoning.
>
> Plaintiff's Deposition Testimony, p. 247 (May 20, 2003).
>
> > Q: And when you said putting on [in the letter], did you mean that Bob didn't believe that the pesticides and insecticides caused your injuries?
> >
> > A: Right, he didn't. He didn't believe that I was even sick. He said that I was making it all up. . . .

Robert argues that the positive test results established causation and, therefore, that Elizabeth discovered her claim as a matter of law sometime prior to the date of the letter, July 26, 1994.

The "new evidence" is speculative and does not establish a "definitive" determination of the "ultimate" causal link between Elizabeth's illness and exposure to chemicals as required by Nelson I.

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[2]In discussing application of the "discovery rule" the Montana Supreme Court uses the terms "knowledge" and "discovery" synonymously. Nelson I at ¶ 24; *Hando v. PPG Industries, Inc.*, 771 P.2d 956, 962 (Mont. 1989); *Kaeding v. W.R. Grace & Co.*, 961 P.2d 1256, ¶ 27 (Mont. 1998).

[3]In later deposition testimony, Elizabeth stated that the test was performed in Colorado. Pl. Dep. p. 246 (May 20, 2003).

Although the positive test results for poison tend to establish the veracity of Elizabeth's assertion that she was exposed to toxic chemicals, they do not confirm her assertion that such exposure caused her illness. As a matter of law, Elizabeth's claim accrued on May 20, 1996 when Dr. Nelson rendered his diagnosis. As in Nelson I, this finding is further supported by the August 11, 1995 report by Dr. Scott indicating that the "cause and effect" relationship between Elizabeth's illness and injury had not yet been determined.

B. The Doctrines of Waiver and Judicial Estoppel.

"Waiver" is a relinquishment of an advantage provided by law. Section 1-3-204, MCA. "[T]he purpose of judicial estoppel is to prevent the use of inconsistent assertions and to prevent parties from playing fast and loose with the courts." Nelson I at ¶ 20. Robert argues that the doctrines of waiver and judicial estoppel apply in the present case due to a mutual release found in the parties' separation agreement dated September 2, 1994, and incorporated into the decree of a dissolution.

The relevant language of the separation agreement is as follows:

> Each party has released and discharged, and by this agreement does for himself or herself . . . release . . . the other of and from all causes of action or claims which either of the parties ***ever had or now has*** against the other. . . .

Sep. Agt. p. 4; 19-24 (emphasis supplied). The Court has determined, as a matter of law, that Elizabeth's claim did not accrue until May 20, 1996. Because the claim had not accrued at the time the separation agreement was executed, the doctrines of waiver do not apply for purposes of the present motion.

C. Negligence.

The Complaint alleges that Robert negligently supervised Merle with respect to the vaccine injection incident. Complaint, VIII. (May 14, 1998). The Complaint also alleges that Robert negligently "caused the application" of chemicals by Elizabeth and others by failing to properly instruct or warn of dangers known to him. Although the Complaint and Elizabeth's briefs are somewhat unclear, this seems to be a general negligence claim, rather than a traditional claim of "negligent supervision."[4]

1. "Negligent Supervison" as to Merle's Actions.

Robert argues that he had no control over Merle and therefore no duty to supervise Merle, an essential element of a "negligent supervision" claim. Robert's arguments as to the law and facts were

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[4]The phrase "negligent supervision," in the context of tort law, is typically understood to apply to the negligence of a defendant-master who has a duty to supervise the tortfeasor-servant who has caused the plaintiff's injury. *See Restatement (Second) of Torts*, §§ 317, 877 (1965).

sufficient to shift the burden to Elizabeth to establish the existence of genuine issues of material fact. Br. Supp. pp. 8-10 (Oct. 14, 2003); Repl. Br. pp. 6-7 (Oct. 21, 2003). No such showing was made. Therefore, there are no genuine issues of material fact as to Robert's control of Merle. As a matter of law, Robert did not have a duty to supervise Merle and summary judgment is proper on this basis.

2. Negligence

In the Complaint, Elizabeth alleges that Robert was "negligent in the application and supervision of dangerous insecticides. . . ." Complaint, p. 2: 27-28 (May 14, 1998). As noted above, it seems the use of the term "supervision" in connection with this negligence claim has caused some confusion. Robert has apparently assumed that this is a traditional "negligent supervision" claim, similar to that brought as to Merle. However, it seems Elizabeth is using the term "negligent supervision" in a general sense, arguing that Robert negligently failed to instruct her on the proper application of chemicals or warn her of certain dangers. Under a general negligence theory, the duty owed by Robert to Elizabeth need not be based on a master-servant relationship.

Robert's theory is that Robert had no duty to supervise Elizabeth because, as a matter of law, they operated the ranch as a partnership. However, even if this Court construes the claim as a "negligent supervision" claim as argued by Robert, whether or not a partnership exists in this case may not be determined as a matter of law. *In re Estate of Bollinger*, 971 P.2d 767 (Mont. 1998)(only when the facts are undisputed or susceptible to only one inference, is the question of whether a partnership exists one of law for the court). If the claim is framed as a general negligence claim, Robert's control of Elizabeth is relevant, particularly as to the "causation" element of the claim. Whether or not the claim is negligence or "negligent supervision," genuine issues of material fact exist sufficient to preclude summary judgement.

III. Conclusion.

For the reasons stated above, summary judgement is granted as to the negligent supervision claim involving Merle and denied on all other grounds.

DATED this 13th day of January, 2004.

GARY L. DAY, District Judge

copies to:
(Court Seal)
J. Dennis Corbin
Robert E. LaFountain
Brent R. Cromley
mailed 1-13-04
crh

MONTANA SIXTEENTH JUDICIAL DISTRICT COURT
CUSTER COUNTY

M. ELIZABETH NELSON, Plaintiff, vs. ROBERT Y. NELSON, Defendant.	Cause No. DV 98-21580 *Judge Gary L. Day* ***MEMORANDUM AND ORDER GRANTING DEFENDANT'S MOTION IN LIMINE***

Defendant has moved the Court for an Order in Limine to exclude at trial all testimony concerning in any way Plaintiff's exposure to ovine ecthyma virus ("Vaccine") or any chemical or agent to which Plaintiff was exposed caused by Merle Nelson ("Merle"). Defendant filed his motion and supporting brief on January 26, 2004; Plaintiff's response brief was filed on January 28, 2004; and Defendant filed a reply brief on January 30, 2004. The matter is deemed submitted for decision by the Court.

MEMORANDUM

The Complaint sets out two distinct classes of negligence: (1) negligent supervision as to Merle, related to injuries allegedly caused by Merle's injection of Plaintiff with Vaccine; and (2) negligence as to injuries related to Plaintiff's exposure to "herbicides," "pesticides," and "insecticides" ("Chemicals") allegedly caused by Defendant. Defendant has been granted summary judgment on the negligent supervision claim; the general negligence claim remains. Accordingly, evidence of Vaccine exposure is irrelevant. Plaintiff's argument that the Vaccine is

EXH 3

a "chemical" for purposes of the general negligence claim is not supported by the allegations in the Complaint. Plaintiff may not "lump" evidence of her exposure to Vaccine in with evidence offered in support of a claim specific to Plaintiff's exposure to Chemicals.

Similarly, because the Court has found that Defendant had no duty to supervise Merle, evidence pertaining to Plaintiff's exposure to Chemicals resulting from Merle's actions is irrelevant. In short, Plaintiff would be attempting to sustain a negligent supervision claim as to Merle's application of Chemicals under the guise of a general negligence claim. Therefore, pursuant to Rule 401 M.R.Evid., Plaintiff may not introduce evidence pertaining to injuries arising out of the actions of Merle.

ORDER

IT IS HEREBY ORDERED that Plaintiff may not introduce evidence at trial concerning Plaintiff's exposure to Vaccine or any Chemicals caused by Merle.

DATED this 5th day of February, 2004.

GARY L. BAY, District Judge

(Court Seal)

pc: Robert E. LaFountain
Thomas A. Mackey

4

RICHARD A. NELSON, M.D.

1001 South 24th Street West • Creekside Two, Suite 202
P.O. Box 80174 • Billings, Montana 59108-0174
Telephone (406) 656-7416

...plomat American Board of Neurology and Psychiatry

May 20, 1996

TO WHOM IT MAY CONCERN:

RE: NELSON, BETTY

This patient having been seen initially by me on March 6, 1996, has a significant list of physical disorders, not the least of which are asthma, reactive airway disease, rheumatoid arthritis, toxic exposure to nervous system associated with agricultural chemicals including herbicides, pesticides, and being directly injected with the vaccine for sore mouth disease in sheep the vaccine being called Ovina Icytha. This resulted in a systemic autoimmune reactivity associated with skin and mucus membrane disorders.

Sincerely,

Richard A. Nelson

Richard A. Nelson, M.D.

RAN/ks
cc: Betty Nelson

SX H
4

RICHARD A. NELSON, M.D.

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plomat American Board of Neurology and Psychiatry

April 17, 1997

TO WHOM IT MAY CONCERN:

RE: NELSON, BETTY

See enclosed copy of my report of ~~April~~ Nov 4, 1996. In addition to that the precise causes and causation of some of her underlying problems is very complex. One would have to go upon the preinjection of ovina ichtha live virus vaccine and notice that from that time forward she has had significant problem with mucus membrane and skin disorders with bleeding, blistering and inflammation. This being a strong immune system reaction I think has been in position to cause problem with activation of underlying rheumatoid arthritis syndrome which was probably previously present but activated by same. How it may have affected her cardiopulmonary status is not known to me at this time but I have always been worried that she may have developed some myocarditis or pericarditis or other complication of the heart associated with this reaction to the ovina ictha vaccine.

We have taken the trouble to ask the Center for Disease Control and some of them have checked with people as far away as New Zealand to find out whether they thought there was any known syndromes associated with live virus in humans. As far as anyone knows this is not ever been found to have been injected into humans, so no one has any background on which to base any expectations of what may happen clinically. This is what we do know, however, is a pox virus, i.e., similar to those that might be labeled as small pox, chicken pox, etc. It appears that it does have a rather violent exacerbation now and then in her case. I believe that a great deal of attention needs to be paid to the thyroid, heart, and if

EXH 5

anything is to be related to this I would believe certainly the skin and mucus membrane reactions, myocardial and pericardial tissues and the exacerbation of diabetes and rheumatoid underlying conditions.

Sincerely,

Richard A. Nelson, M.D.

RAN/ks
Encl.

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t American Board of Neurology and Psychiatry

ELSON, BETTY 11-4-96

Seen at office. Patient comes in noting her feet and legs are swelling again. I told her she should probably stop that HCTZ and start some Furosemide 40 mg. bid up to tid. Presently taking Prednisone 30 mg. per day. If she stops it, she starts with pain again, however, it does produce edema as well. She knows how to reduce the dosage gradually. Blood sugar most recently 188 mg. percent. Potassium supplements she takes 10 mg. 3-4 times day. Glypizide 5 mg. a.m. and p.m. Switching her from Synthroid to Thyroid Armor 30 mg. tablet 1 a day. Also going to stop the HCTZ and start her on Furosemide 40 mg. bid. Max dose will be tid for her. She is having some spontaneous bruising for her so we are going to do chem screen, CBC, diff. This patient has a very complex problem not the least of which has to do with the presence of diabetes, liver function damage, probable sleep apnea with hyperventilation syndrome, hypothyroidism, rheumatoid arthritis proven by antinuclear antibody titers and rheumatoid factor titers, morbid obesity, probable Pickwickian syndrome, not the least of which was injection by her father-in-law of direct injection of live virus for sheep sore mouth disease into patient. This vaccine goes by name of Ovina Ictha. This live virus created a mucus membrane and skin reaction rather violently for her. It has recurred several times. My question at hand is that she denies she had any significant problem with thyroid, heart, swelling or skin prior to this injection. Now she has what appears to be hypothyroidism. She may well have active pericarditis myocarditis. She has gradual failure I think of heart in one way or another with peripheral edema that is evident. Mucus membranes and skin don't look too bad today but she bruises easily and I think she may well have some peripheral platelet or other problem. We are going to have to get a chem screen, CBC, diff for that purpose. Have her followed by internist or physician in Miles City as well to make sure we try to keep abreast of what is going on with large number of problems and medications going on simultaneously. I think leaning on idea of possible pericarditis myocarditis is something we ought to do and also take a look and see if scan of thyroid would help us in terms of any kind of general diffuse and flammatory process there to see if we have any evidence that this infected live virus may have had something to do with these organ system disturbances.

Richard A. Nelson

RICHARD A. NELSON, M.D.

cc: Dr. Malley plus original report, information regarding the Ovina Ichta.

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plomat American Board of Neurology and Psychiatry

June 1, 1997

RE:

Dear Robert:

With regard to your letter to Betty Nelson of May 7, 1997, the only things I can address myself to is questions 5,6,7.

The status of the research at Center for Disease Control was simply information that I had contacted them with verbally telling them about the case and the fact that they had never seen this kind of situation before but did inform me that this was pox virus of the same family of pox viruses for example chicken pox, small pox, etc. only in animal and sheep sore mouth disease. They had never heard of anyone having an injection of live virus so the clinical status of this was not known to anyone. He said he would talk to, and this was Dr. Espizito, said he would talk to a friend of his who was world expert in New Zealand on sheep sore mouth disease and a veterinarian as well as physician. They apparently did talk with him and he himself that he had never seen this kind of situation before where someone had been injected with the live virus. Betty probably represents one of the only cases known to anyone that we have been able to talk to of having recurrent blistering and hemorrhagic blisters in the mouth and upper respiratory system coming and going. One of the unusual things about it is the recurrence of it. Normally when we have small pox or chicken pox, if we have the disease, it then suppresses the disease and there is no further problem from it. In this case it is not working. The patient seems to be having recurrent episodes.

Ex H
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RICHARD A. NELSON, M.D.
1001 South 24th Street West • Creekside Two, Suite 202
P.O. Box 80174 • Billings, Montana 59108-0174
Telephone (406) 656-7416

Diplomat American Board of Neurology and Psychiatry

December 9, 1997

Robert LaFountain

RE: NELSON, BETTY

Dear Robert:

With regard to your letter of November 18, 1997, and the patient, Betty Nelson. The patient's health problems are legendary in terms of numbers. I will go through them one at a time and then make statement about what relationship they might have to pesticides and insecticides and injection of ovine icthema vaccine.

Her diagnosis in order are:
1. Morbid obesity.
2. Rheumatoid arthritis (sero positive).
3. Sleep apnea and Pickwithian syndrome.
4. Ovine Ichta infectious pox virus with relapsing mucus membrane and skin reactions on at least six occasions in past two years.
5. Hypothyroidism.
6. Hypertensive cardiovascular disease.
7. Pulmonary osteodystrophy.
8. Heavy history of pesticide and herbicide exposure.
9. Chronic obstructive pulmonary disease.
10. Diabetes treated with Glypizide and not insulin dependent.
11. Depression.
12. Loss of taste and smell sense (since ovina ichta exposure).
13. Chronic bronchitis aggravated by induced to considerable degree by ovina ictha injection.

With all of those in mind any and all of them can be aggravated by the exposure to any agents that are biologically active as ovina

EXH 7

ictha but most especially lung and membranes and skin. The pesticides and herbicides would have bothered her nervous system and immune system but they have not been worked up to the extent we would know whether that is the case or not. We have to do some very special testing of the nervous system such as PET scans, neuropsychological, P300s, etc. before we know that. She does have so many diagnoses that are amenable to being aggravated by external stressors in the environment, and or even social and environmental problems associated with finances, personal relationships, stress of emotional type.

Sincerely,

Richard Nelson

Richard A. Nelson, M.D.

GABERT MEDICAL SERVICES, INC.

107 Dilworth
Glendive, Montana 59330
PH. (406) 365-8901

April 23, 1997

Robert LaFountain
208 N. 29th Street, Suite 227
Billings, Montana 59101

Re: Montana Elizabeth Nelson

Dear Mr. LaFountain;

I am writing this letter to you on behalf of Betty Nelson. I've only been seeing Betty since December of 1996 but certainly feel in a position to comment on her multiple medical problems. Much of my information is historical and comes from medical records that have been forwarded to me from Dr. Nelson and others. Apparently, Betty was in good health until an occupational exposure to a live virus vaccine in 1989. Since then, she's developed a multitude of progressive chronic medical problems that ultimately are traced back to her exposure. Currently, her problems include non-insulin dependent diabetes, pulmonary involvement, rheumatoid arthritis, congestive heart failure, neuropathies, hypothyroidism, obesity and sleep apnea.

While many of these problems may be seen in individuals without the exposure Betty has experienced, it certainly is unusual to see so many significant problems present at once. Betty's condition is indeed serious and she is on multiple medications which have significant long-term consequences. Betty currently has need of constant medical follow-up and this will probably increase as time goes on.

I hope this provides the information you are looking for. If I can provide any further information, or you need more detail, please don't hesitate to call.

Sincerely,

Bruce R. Swarny, M.D.

BRS/emh

EXH
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GABERT MEDICAL SERVICES, INC.

107 Dilworth
Glendive, Montana 59330
PH. (406) 365-8901

August 14, 1997

Robert Lafountain
208 N. 29th Street
Suite 227
Billings, MT 59101

RE: Montana Elizabeth Nelson

Dear Mr. Lafountain:

I wanted to provide you with some follow up on Betty. She is being seen by multiple specialists including Neurologists, Dr Nelson and Rheumatologist, Dr. Cotsamire. Betty continues to be plagued by multiple problems. Her arthritis has proven difficult to control. She did have a bout with weakness that required hospitalization in Miles City. I do not have details of that admission. Dr. Nelson has made a referral to a specialist in Missoula. Betty's recent labs continued to show marked abnormalities in liver function with no clear explanation other than her exposure to the toxin.

I will keep you apprised as more information is available. Betty assures me Dr. Nelson is writing you as well which I feel is appropriate as he was her initial point of contact.

Sincerely,

Bruce R. Swarny, M.D.

BRS:mm

EXH 9

ROBERT E. LAFOUNTAIN
208 NORTH 29TH STREET
SUITE 227
BILLINGS, MT 59101
ATTORNEY FOR PLAINTIFF
(406) 256-2110

MONTANA SIXTEENTH JUDICIAL DISTRICT COURT, CUSTER COUNTY

M. ELIZABETH NELSON, Plaintiff, vs ROBERT Y. NELSON, Defendant.	No. DV 98-21580 ANSWER TO DEFENDANT'S FIRST INTERROGATORIES, REQUESTS FOR PRODUCTION AND REQUEST FOR ADMISSIONS TO PLAINTIFF

In response to Defendant's First Interrogatories, Requests for Production and Request for Admissions to Plaintiff dated June 9, 1998, Plaintiff responds as follows:

REQUEST FOR ADMISSION NO. 1: Admit that you were diagnosed prior to February 9, 1994, with Sleep Apnea, Hypoventilation Syndrome, and Pickwickian Syndrome by Dr. L. Keith Scott, M.D.

RESPONSE: Admit.

REQUEST FOR ADMISSION NO. 2: Admit that you filed almost the same action in Cause No. 20,708 entitled "In Re the Marriage of Robert Y. Nelson, Petitioner, and Montana "Betty" E. Nelson, Respondent.

RESPONSE: Deny. I filed a Motion For Modification of Separation Agreement which indicated that my problems may stem "from certain poisons used on the ranch". The Court stated that any action under the Toxic Chemical Act should be separate action. At that time we were still evaluating the possible cause of my health problems. It was not until

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August of 1995 that the University of Colorado Health Sciences Center confirmed that the Bovine Ecthyma Vaccine may be the cause of my health problems.

REQUEST FOR ADMISSION NO. 3: Admit that in Cause No. 20,708, the dissolution of marriage, you never mentioned the injection of Bovine Ecthyma Vaccine.

RESPONSE: Mr. Corbin stated that my health was not inmissable in court! I also did not know that the injection was the likely cause of my health problems at that time.

INTERROGATORY NO. 1: Please state the month, day, and year that you visited, as a patient, the University of Colorado Toxicology Clinic.

ANSWER: April 26, 1995

REQUEST FOR PRODUCTION NO. 1: Please produce a copy of Dr. Parringer's evaluation performed on you on February 7, 1995.

RESPONSE: I only saw Dr. Parringer twice at Billings Clinic and he didn't know what was wrong with me; He told me poison is hard to trace unless done right after exposure.

REQUEST FOR ADMISSION NO. 4: Admit that on April 3, 1995, in a letter from Dr. L. Keith Scott, M.D. to Mr. Stephen Moses, Attorney at Law, Dr. Scott indicated that Plaintiff has the following diseases: (1) Obstructive Lung disease, (2) Obstructive Sleep Apnea, (3) Pulmonary Hypertension secondary to 1 and 2, (4) Seropositive Rheumatoid Arthritis, (5) Hypothyroidism, (6) Depression.

RESPONSE: I am not sure of the date of any such letter. Dr. Scott may have diagnosed these conditions. On August 11, 1995 he diagnosed severe pulmonary hypertension, secondary to chronic obstructive disease sleep apnea.

REQUEST FOR PRODUCTION NO. 2: Please produce any doctors, evaluations, diagnosis, reports, or any other writing that would indicate that the Plaintiff suffers any disease or disability as a result of being inoculated by Bovine Ecthyma Vaccine.

RESPONSE: See Dr. Kasnett Report. copy attached; See Dr. Nelson Report, copy attached; See Report of Marla Malley PAC, copy attached; See report of L. Keith Scott,

M.D., copy attached; Dr. Swarny, copy attached.

REQUEST FOR PRODUCTION NO. 3: Please produce any doctors, evaluations, diagnosis, reports, or any other writing that would indicate that the Plaintiff suffers from any of the diseases listed in Paragraph 7 of Plaintiff's Complaint resulting from toxic chemicals and more particularly, toxic chemicals or herbicides handled by the Plaintiff or the Defendant.

RESPONSE: See Responses and attachments, Request for Production No. 2.

REQUEST FOR PRODUCTION NO. 4: Please produce a copy of all of Plaintiff's medical records from January 2, 1986, to the present.

RESPONSE: Didn't start failing until 1990; Copies of medical reports will be supplied as received.

INTERROGATORY NO. 2: Please state the names and addresses of all individuals who were present in July, 1989, at the time that the Plaintiff was assisting in the inoculation of sheep.

ANSWER: Earl Goddard, Copes Trailer Court, Lot 21, Miles City, MT 59301; Marla Malley, 1101 Woodbury, Miles City, MT 59301; Defendant, Bob Nelson; JoAnn Preller, 1215 N. Jordan, Miles City, MT 59301; Wade Hunter, 1215 N. Jordan, Miles City, MT 59301.

INTERROGATORY NO. 3: Please state the name and address of the individuals who saw you lose conscienceness in July of 1989 while vaccinating sheep with the Bovine Ecthyma Vaccine.

ANSWER: See answer to Interrogatory No. 2.

INTERROGATORY NO. 4: Please state the name, address and phone number, and a short synopsis, of any and all experts who will testify on your behalf at the time of trial with regards to the allegations that the diseases listed in Paragraph 7 of your Complaint were caused as a result of your alleged inoculation with Bovine Ecthyma Vaccine, or by the use of pesticides or herbicides.

ANSWER: Marla Malley, PAC, Glendive Medical Center, 202 Prospect Drive, Glendive, MT 59330, (406) 365-3306 (Examination, evaluation, observation of medical conditions); Dr. L. K. Scott, Columbus Hospital, Great Falls, MT 5901, (Examination, evaluation); Dr. Michael J. Kossnet, University of Colorado Health Sciences Center, Campus Box B215, Dept. of Surgery, Occupational and Environmental Toxicology Program, 4200 East Ninth Ave, Denver, CO, 80262; Richard A. Nelson, 1001 South 24th St W., Creekside Two, Suite 202, P.O. Box 80174, Billings, Montana 59108.

REQUEST FOR ADMISSION NO. 5: Please admit that contrary to the recommendations of Dr. L. Keith Scott, MD. that you were not to be exposed to smoke, that you operated as the manager or in some other capacity, a bar, known as the "Wildwest Hideway".

RESPONSE: Deny; I received no such instruction but it was so recommended; I did work at the Wildwest Hideaway. Because of my health problems, they set up a smoke purifier catcher.

INTERROGATORY NO. 5: If you admitted Request for Admission No. 5 above, please state all occupations that you have held since July of 1989 to the present, and the dates of employment.

ANSWER: Rancher wife 1989-1992; Hideaway 1992-1993; 1993-1996 (manage drink mixing, general duties of management)

INTERROGATORY NO. 6: Do you presently have medical insurance or other insurance in force that covers or continues to cover any of the diseases mentioned in Paragraph 7 of your Complaint?

ANSWER: Medicare.

REQUEST FOR PRODUCTION NO. 5: Please produce a copy of all claims made, paid or denied, under any medical insurance since January 2, 1986.

RESPONSE: I received $1,400.00 in 1992 from insurance when I thought I slipped and fell, but kept falling and blacking out. Aim. Ins. Co.

REQUEST FOR PRODUCTION NO. 6: Please provide a copy of all income from all sources since your dissolution of marriage from the Defendant.

RESPONSE: Social Security $392.00 a month, which $200.00 is for rent and $195.00 goes to pay state taxes that Mr. Corbin didn't pay.

REQUEST FOR ADMISSION NO. 6: Admit that the health problems listed in Paragraph 7 of your Complaint were known or should have been known prior to August, 1995.

RESPONSE: The doctors were checking but did not know for sure what was wrong, I was hospitalized in April.

INTERROGATORY NO. 7: If you did not know of the medical problems or health problems listed in Paragraph 7 of your Complaint prior to August of 1995, please state, in detail, the following:

(a) The reason you did not know of the health problems prior to August, 1995;

(b) The exact date that you did learn of your health problems listed in paragraph 7 of the Complaint;

(c) The doctor, expert, or other individual who informed you of these health problems listed in paragraph 7;

(d) The dates of the consultations, reports, evaluations, or other writing, that would substantiate the date that you learned of this health problem;

(e) The date that the expect indicated to you that your health problems listed in Paragraph 7 of the Complaint were the direct and proximate result of contact with pesticides or herbicides, and the name of the expert who so indicated.

(f) The date that the expert indicated to you that your health problems listed in Paragraph 7 of the Complaint were the direct and proximate result of Bovine Ecthyma Vaccine, and the name of the expert who so indicated.

ANSWER:

a) I am not a medical professional. It was not until 1995 that medical professionals

made the connection of cause to the injection and chemicals.

b) Probably 11-4-96 through Dr. Nelson's evaluation.

c) See Dr's reports referred to in Response to Interrogatory No. 4.

d) See Reports referred to in Response to Interrogatory No. 4.

e) See Response to Interrogatory No. 4.

f) See Response to Interrogatory No. 4.

REQUEST FOR ADMISSION NO. 7: Admit that you did not, prior to your Complaint on file herein, indicate that Merle Edward Nelson, Defendant's father, negligently injected you with the Bovine Ecthyma Vaccine until after Merle Edward Nelson;s death..

RESPONSE: I didn't remember it right away until I had several breakouts, and I had not considered the connection to my problems until analysis in 1995. I have witnesses that have see it and so has Defendant.

REQUEST FOR ADMISSION NO. 8: Admit that you were unhappy with your divorce settlement and as a result thereof, have filed this action.

RESPONSE: Deny. Mr. Corbin would not let my health be admitted into court. The reason I filed a complaint is because Defendants actions caused my health problems.

REQUEST FOR PRODUCTION NO. 7: Produce a copy of any doctor's reports, evaluations, or other written document that would indicate that the Plaintiff was diagnosed in August of 1996 with any of the diseases listed in Paragraph 7 of the Complaint and that would further indicate that these diseases were caused, either directly or indirectly, by contact with pesticides or by injection of the Bovine Ecthyma Vaccine.

RESPONSE: See Response to Interrogatory No. 4.

INTERROGATORY NO. 8: List all witnesses that you intend to call at trial and any other witnesses that may have personal information with regards to your cause of action, including their full names, addresses, telephone numbers, and a short synopsis of their testimony.

ANSWER: Cassandra Kercheval, 2310 Valley Dr. East #13, Miles City, MT 59301; Shelly Dyba, Miles City, MT 59301; Earl Goddard, Copes Trailer Court, Lot 21, Miles City, MT 59301; JoAnn Pretter, 1215 N. Jordan, Miles City, MT 59301; Wade Hunter, 1215 N. Jordan, Miles City, MT 59301; Jodie Preston, Tongue River Stage, Miles City, MT 59301; Dr. Samuel H. Mehr, MD, Alegan Health Systems, Bergan Mercy Medical Center, Omaha, NE; Professionals listed in response to Interrogatory No. 4.

DATED this 5 day of Aug., 1998.

M. Elizabeth Nelson, Plaintiff

Robert E. LaFountain
Attorney for Plaintiff

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing was mailed, first class, this 5 day of Aug., 1998.

J. Dennis Corbin
Attorney at Law
23 North 8th - P.O. Box 338
Miles City, MT 59301

ROBERT E. LAFOUNTAIN

ALEGENT HEALTH SYSTEMS
BERGAN MERCY MEDICAL CENTER OUTPT

ATIENT NAME:	NELSON,MONTANA		UNIT #: 611412
ATIENT STATUS:	OA	SEX:	F
WARD/SERVICE:	NUC	DOB:	03-Jan-39
ROOM NO:	NUC-	AGE:	59
DATE OF EXAM:	18-Feb-98		
EXAM #-DATE:	39A-021898		ACCT NO: 70294004

ORDERING DOCTOR: RICHARD A NELSON MD
P.O. BOX 80174
BILLINGS MT 59108-0174

REASON FOR EXAM: NERVE DAMAGE-INSECTICIDE POISONING
PT FULL NAME MONTANA ELIZABETH--GOES BY BETTY

Exam: NM BRAIN PET SCAN

POSITRON EMISSION TOMOGRAPHY FOR BRAIN METABOLISM:
ATTENUATION IMAGES OF THE HEAD WERE OBTAINED.

FOLLOWING THE INTRAVENOUS ADMINISTRATION OF 370 MBq OF FLUORINE-18
DEOXYGLUCOSE, IMAGES OF THE BRAIN WERE OBTAINED AND RECONSTRUCTED IN
THE CORONAL, TRANSAXIAL, AND SAGITTAL PLANES.

CORTICAL METABOLISM IS GLOBALLY HETEROGENEOUS WITH MULTIPLE AREAS OF
FUNCTIONAL CORTICAL DEFICIT INTERSPERSED WITH AREAS OF RELATIVE
SPARING. THERE IS ASYMMETRY OF THE DEEP STRUCTURES OF THE BRAIN WITH
RELATIVELY DIMINISHED METABOLISM IN THE LEFT BASAL GANGLIA WHEN
COMPARED WITH THE RIGHT.

DOMINANT AREAS OF FRONTAL HYPOMETABOLISM ARE IDENTIFIED.

IMPRESSION: GLOBAL ABNORMALITIES OF BRAIN METABOLISM AS DESCRIBED
ABOVE COMMONLY ASSOCIATED WITH THE ENCEPHALOPATHIES.

signed: SAMUEL H. MEHR, M.D.

HM/kas

TRANSCRIBE DATE: 02-Mar-98
EDIT RM TIME: 09:00

EXH 11

ALEGENT HEALTH SYSTEMS
BERGAN MERCY MEDICAL CENTER IP/ER

PATIENT NAME: NELSON, MONTANA
PATIENT STATUS: OA
WARD/SERVICE: NUC
ROOM NO: NUC-
DATE OF EXAM: 18-Feb-98
EXAM #-DATE: 304A-021898

UNIT #: 611412
SEX: F
DOB: 03-Jan-39
AGE: 59

ACCT NO: 70294004

ORDERING DOCTOR: RICHARD NELSON

REASON FOR EXAM: NERVE DAMAGE/INSECTICIDE POISONING
******
Dr's address is:
P.O. Box 80174; Billings, MT 59108

Exam: CT HEAD W/O CONTRAST

NONCONTRAST CT SCAN OF THE HEAD WAS PERFORMED. THE VENTRICLES APPEAR NORMAL IN SIZE. NO FOCAL AREA OF INCREASED OR DECREASED DENSITY IS NOTED. NO MIDLINE SHIFT OR MASS EFFECT IS SEEN. NO INTRACRANIAL HEMORRHAGE IS NOTED.

IMPRESSION: NEGATIVE CT SCAN OF THE HEAD.

signed: W.L. HARRISON, M.D.

WLH/kas

TRANSCRIBE DATE: 18-Feb-98
UNIT RM TIME: 09:50

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Robert E. LaFountain
932 Dixon
Billings, Montana 59105
Telephone: (406) 248-2948

Attorney for Plaintiff

MONTANA SIXTEENTH JUDICIAL DISTRICT COURT, CUSTER COUNTY

M. ELIZABETH NELSON, Plaintiff, vs ROBERT Y. NELSON, Defendant.	Cause No. 98-21580 PLAINTIFF'S DISCLOSURE OF EXPERTS

COMES NOW Plaintiff M. Elizabeth Nelson, by and through her attorney of record and herein discloses the following as experts she intends to call at trial in the above-entitled matter:

Richard A. Nelson, M.D.
1001 South 24th Street West
Creekside Two, Suite 202
P.O. Box 80174
Billings, Montana 59108-0174

Bruce R. Swarny, M.D.
Gabert Medical Services, Inc.
107 Dilworth
Glendive, Montana 59330

Expert Testimony:

Dr. Nelson is a neurologist and a diplomat of the American Board of Neurology and Psychiatry. He will testify regarding the likelihood that Plaintiff's injuries and illnesses were caused by exposure to pesticides, herbicides and insecticides or other ranch related chemicals and by inoculation with a live virus (Ovine Icthema). Based upon his medical and practical experience, education and extensive examination and evaluation of

EX

the Plaintiff and upon extensive research, including consultations with other professionals, he will testify that the aforementioned medical and physical problems of the Plaintiff were likely caused by the exposures listed hereinabove.

Dr. Bruce Swarny is a medical practitioner residing in Glendive, Montana. Dr. Swarny will testify regarding Plaintiff's multiple medical problems and, based upon his extensive examinations and evaluation of the Plaintiff, will testify that the aforementioned medical and physical problems of the Plaintiff were likely caused by the exposures listed hereinabove.

Both Dr. Nelson and Dr. Swarny will testify as to their exams and will witness as to the effects, symptoms, diagnosis, and treatment relating to sore mouth and respiratory and other physical problems suffered by the Plaintiff. Both Dr. Nelson and Dr. Swarny will testify as to their review of records held by Dr. L. Keith Scott, Dr. Michael Kosnett of the University of Colorado Health Sciences Center, Marla Malley, PAC, Glendive Medical Center and Bergan Mercy Medical Center.

DONE AND DATED this 3rd day of June, 2003.

Robert E. LaFountain
Attorney for Plaintiff

CERTIFICATE OF MAILING

I certify that a true and correct copy of the foregoing was duly sent by U.S. Mail, postage prepaid, this 5th day of June, 2003 to:

J. Dennis Corbin
Attorney at Law
23 North 8th - P.O. Box 338
Miles City, MT. 59301

Brent R. Cromley
MOULTON, BELLINGHAM,
LONGO & MATHER, P.C.
Suite 1900, Sheraton Plaza
P.O. Box 2559
Billings, Montana 59103-2559

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Robert E. LaFountain
932 Dixon
Billings, Montana 59105
Telephone (406) 248-2948
Attorney for Plaintiff

MONTANA SIXTEENTH JUDICIAL DISTRICT COURT, CUSTER COUNTY

M. ELIZABETH NELSON, Plaintiff, vs ROBERT Y. NELSON, Defendant.	Cause No. DV 98-21580 PLAINTIFF'S RESPONSES TO DEFENDANT'S SUPPLEMENTAL DISCOVERY REQUESTS

COMES NOW Plaintiff herein, M. Elizabeth Nelson, and responds to Defendant's Supplemental Discovery Requests as follows:

REQUEST FOR PRODUCTION NO. 26

Please produce all documents evidencing a blood test referenced in a letter to Defendant dated July 26, 1994.

RESPONSE:

I have checked with all doctors I could think of to call and they can't find any record of such blood tests after so many years because old records are destroyed. I am not in possession of, nor can I obtain such records.

INTERROGATORY NO. 33.

Please identify and list with specificity which medical or healthcare associated costs you allege are associated with the allegations contained in your Complaint

EXH
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including without limitation any prescription drug costs or any expenses you claim as damages.

RESPONSE:

You have already been given these findings. See response to Request for Production No. 2. Said reports referred to in Request for Production No. 2 demonstrate the application of health and medical responses to medical problems I have had. See copies of all Deaconess Hospital Medicare/Nursing/Prescriptions reports submitted prior to this date in response to interrogatories. See letter submitted to your office in May of 2003 with copies of Deaconess medical bills, Holy Rosary Care bills, Billings Clinic bills, Specialty Laboratories Inc., bills, and Medicare balance. See attached copy of Dr. Nelson report dated 11-4-96, which copy you have previously obtained, which report lists many of the medications I have had to take in the course of treatment. Please see copies of all Social Security information provided to your office previously. See copy of attached 24 page Medical Expenses Report of Wal-Mart Pharmacy from 01/01/1996 to 09/18/2003. I am attempting to obtain copies of pharmacy report information from Big Sky Pharmacy of Miles City which will list other pharmacy bills.

INTERROGATORY NO. 34

Please identify with specificity all chemicals or substances (including all pesticides, insecticides, veterinary medications or herbicides) to which you claim you were exposed as alleged in your Complaint and contributed to your medical condition including the name, address and phone number of the manufacturers and distributors of the above substances.

RESPONSE:

See attached copy of Ectrin Insecticide Water Dispersible. This product was used on sheep for control of flies, ticks and other insects. The product was mixed for close up external spraying from a 300 gallon tank with a gas powered pressure sprayer. Robert Nelson failed to provide breathing apparatus or other protection when he instructed me in the application process.

See attached copy of Gustafson Material Safety Data Sheet. Manufacturer's address included therein. This product and manufacturer's information supplies names of chemical mixed with wheat prior to planting. The product was mixed in the back of a truck while standing in it. Later my feet swelled up. Robert Nelson failed to provide me with breathing apparatus or other protection when he instructed me in the application process.

The primary local supplier of the chemicals and substances, Fellman's, is no longer in business. The gentleman who flew the plane to distribute the insecticides and herbicides has left Montana for the winter. Some of the chemicals were bought from him. His name is Laurence Artz.. His address is Jordan, Montana and his telephone number is (406) 557-2871. Western Ranch Supply has disposed of old records because the Nelson Ranch file was inactive. Jake Fellman, who lives in Jordan, Montana advised that Ectrin was supplied for sale during the time of the applications involved here by Western Ranch Supply. A person who will remember the application of the Gustafson herbicide that was used on the grains or their application is Tami James, whose address is Miles City, Montana. Tami James was secretary at the elevator in Miles City at the time. My son, Matthew Kercheval, of 1219 Ivy, Miles City assisted in some of the application

and will remember the process for application of pesticides, insecticides and herbicides. Matthew was there during part of the time during lambing and planting. After thirteen years, I cannot remember the names of the insecticides or pesticides or herbicides that were used. Initially, I had no reason to remember the names because, although I had growing health problems, I did not know that there was a connection of those health problems with the spraying and application of herbicides, insecticides and pesticides. The name of the sheep injection is bovine ecthyma. A copy of the cover of the box is attached. Some of the insecticides and pesticides were bought from Fellman's. Some were bought from the elevator. Some were bought from the plane sprayer. Some were bought from Western Ranch Supply. Bob Nelson knows the names of all of these because he did most purchasing and most application or authorized applications because he was licensed to buy and use the chemicals. I was not.

ADDITIONAL INFORMATION:

Attached hereto is a copy of my income tax filings for the years 2001 and 2002.

DATED this 23 day of September, 2003.

M. Elizabeth Nelson
M. Elizabeth ("Bette") Nelson

Robert E. LaFountain
Attorney for Plaintiff

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COPY

Robert E. LaFountain
Attorney At Law
932 Dixon
Billings, Montana 59105
Telephone (406) 248-2948
Attorney for Plaintiff

MONTANA SIXTEENTH JUDICIAL DISTRICT COURT

CUSTER COUNTY

M. ELIZABETH NELSON, Plaintiff, vs. ROBERT Y. NELSON, Defendant.	Cause No.: DV 98-21580 FINAL PRE-TRIAL ORDER

Pursuant to Rule 16 of the Montana Rules of Civil Procedure and pursuant to Court Order dated 20 August 2003, a pre-trial conference was held in the above-entitled cause on the 2rd day of February, 2004. Attorney Robert E. LaFountain represented the Plaintiff. Attorney Thomas Mackay represented the Defendant.

I. AGREED FACTS

The following facts are admitted, agreed to be true and require no proof:

1. Plaintiff M. Elizabeth (Bette) Nelson and Defendant Robert Y. Nelson (Robert) were married from 1986 through 1996.
2. Bette and Robert lived on a ranch near Miles City Montana.
3. Prior to their Marriage Robert suffered a stroke.
4. There is a dispute between the parties as to whether the ranch operation was a partnership or not.
5. Bette contributed in excess of $54,000.00 cash, machinery, equipment and livestock to the ranch business operation.

EXH
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6. Bette did the bookkeeping of the Ranch Operation to give to Robert Martinak, Accountant, and Bette and Robert shared a joint account funded from the profits thereof.

7. Bette has substantial physical problems which she attributes to application of chemicals during operations on the ranch. Robert denies that the ranch operations are the cause of Bette's problems.

II.PLAINTIFF'S CONTENTIONS

1. Plaintiff (Bette) alleges that Defendant (Robert) was negligent and breached his duty of care to her by failing to instruct and warn regarding the application of chemicals including Ovine Ecthyma, pesticides, herbicides and insecticides, during ranch operations, said negligence resulting in injury to Bette.

2. Plaintiff, as a result of Defendant's negligence, suffered substantial physical injury the effects of which are still present in the form of daily and recurring respiratory, muscular, skeletal, and nerve system maladies.

3. Defendant Robert Nelson is liable to Plaintiff for the cost of past, present and future medical services incurred, or to be incurred as a result of said Defendant's wrongful actions or omissions; for pain and suffering; for loss of enjoyment of life; for past, present and future lost wages; for wrongful and negligent infliction of emotional distress; and for costs of suit and attorneys fees.

4. Operation of the ranch included annual and periodic application of chemicals including Ovine Ecthyma for sheep, pesticides, insecticides and herbicides.

5. Robert and his ex-wife, Lorraine Normandy Nelson, owned the ranch operation and most of the land involved in the ranch operations during the term of the marriage between the parties. A month before the ranch was sold, in 1991, the cattle were sold off to pay off Robert's father, Merle, who had loaned Robert the money to pay Lorraine for her interest in the ranch.

III. DEFENDANTS' CONTENTIONS

1. Defendant denies the allegations of Plaintiff;
2. Defendant disputes liability for Plaintiff's alleged damages based on the absence of a recognized duty of care and the causal connection between the alleged exposures and the alleged damages;
3. Defendant disputes the nature existence and extent of Plaintiff's alleged damages;
4. Defendant contends that Plaintiff was well aware of her injuries and the causal connection to her ranch experience on or before July 26, 1994 and thus her claim is bared by the applicable statute of limitations
5. Defendant contends Plaintiff was aware of the existence of a claim prior to July 26, 1994 and her claim is bared pursuant to a release and discharge of claims contained in a Legal Separation Agreement dated September 2, 1994.
6. Defendant contends that Plaintiff's alleged injuries were caused by latent diabetes, morbid obesity, chronic bronchitis and other such conditions that were pre-existing.
7. Defendant contends that all injuries alleged in Plaintiffs Complaint were incurred within the scope of the ranch operation business from which Plaintiff directly profited.
8. Defendant contends that at all times relevant to the allegations in Plaintiff's Complaint Plaintiff and Defendant were co-operating a ranch business for profit as a Montana General Partnership in which Plaintiff was controlling partner thus obviating any duty Defendant owed to Plaintiff.
9. Defendant contends that Plaintiff's alleged injuries were caused solely by her own negligence and alternatively that her negligence contributed to her injuries.
10. Defendant contends that evidence with respect to the acts of Merle Nelson or Plaintiff's exposure to Ovine Ecthyma Vaccine is inadmissible pursuant to this Court's Order granting Defendant partial summary Judgment dated January 13, 2004.
11. Defendant contends that Plaintiff is not entitled to attorney fees and cost of any nature.

IV. EXHIBITS

Plaintiff's Exhibits:

1. Medical billings and records;
2. Dr. Richard A. Nelson reports and evaluations;
3. Dr. Bruce R.Swarney reports and evaluations;
4. Marla Malley, P.A.C. Glendive Medical Center reports;
5. Ovine Ecthyma sample;
6. Deaconess billing and records;
7. Glendive Medical Center billing and records;
8. Holy Rosary Hospital billing and records;
9. Holy Rosary Extended care billing and records;
10. Medicare records;
11. Social Security records;
12. University of Colorado letter re medical condition;
13. Nelson income tax records;
14. Billings Clinic billing and records;
15. Specialties billing and records;
16. Big Sky Pharmacy billing and record;
17. Wal-Mart Pharmacy billing and record;
18. Gabert Medical Services, Inc., billing and record;

Defendants' Exhibits:

1. Letter from Bette Nelson to Bob Nelson dated July 26, 1994;
2. Excerpt Transcript of proceedings (Testimony of Bette Nelson, Cause No. DF 97214-06);
3. Affidavit of Bette Nelson dated December 4, 2002;
4. Medical Records of Montana E. Nelson;
5. Deposition testimony and written discovery responses of Montana E. Nelson;

6. Legal Separation Agreement dated September 4, 1994;

7. Plaintiff's tax returns;

8. Documents of Record in the parties divorce;

9. Independent Medical Examination and deposition testimony of Dr. Patrick Cahill;

10. All Exhibits listed by Plaintiff;

V. WITNESSES

Plaintiff's Witnesses:

1. M. Elizabeth Nelson;
2. Robert Y. Nelson;
3. Dr. Richard A. Nelson, treating physician;
4. Dr. Bruce R. Swarney, treating physician;
5. Marla Malley; Physicians Assistant; effects of chemicals;
6. Wade Hunter, observed injection;
7. JoAnn Preller, observed injection;
8. Matt Kercheval, observed chemical applications;
9. Earl Goddard, observed injection;
10. Dr. L. Keith Scott, treating physician;
11. Jodi Preston, observed sheep inoculations and lack of safety.
12. Shelli Dyba, observed Bette's throat and feet breakouts.

Defendants' Witnesses:

1. All witnesses listed by Plaintiff
2. Dr. Patrick Cahill
3. Robert Nelson.
4. Friends and acquaintances of Plaintiff familiar with her physical condition and lifestyle.
5. Melvin Green and his son.

VI. ISSUES OF FACT

Plaintiff's issues defined:

1. Is Defendant Robert Nelson liable for injury to Bette Nelson and responsible for compensatory damages or other damages for the injury, loss of enjoyment of life, emotional distress and pain and suffering he negligently inflicted upon Plaintiff?
2. Is the Defendant liable to Plaintiff for the costs of suit and attorneys fees incurred in prosecuting this action?

Defendants' issues defined:

1. Was Defendant negligent?
2. Did the negligence attributed to the Defendant, if any, cause or contribute to Plaintiff's injuries?
3. Did Plaintiff know or should Plaintiff have known she had a claim prior to July 26, 1994?
4. Did all injuries alleged in Plaintiff's Complaint occur within the scope of the partnership business?
5. Were Plaintiff's injuries caused by a pre-existing condition?
6. Was Plaintiff negligent?
7. Were Plaintiff's injuries caused by Plaintiff's negligence?

VII. ISSUES OF LAW

Plaintiff's issues defined:

1. Did Defendant Robert Nelson owe and breach a duty of care to Bette Nelson, his wife, relating to foreseeable risk of harm and the application of chemicals during the operation of the Nelson ranch?
2. Does Defendant Robert Nelson owe Plaintiff for damages incurred by Bette Nelson during the application of chemicals on the Nelson ranch?

Defendants' issues defined:

1. Did Robert owe Plaintiff a Duty to supervise, instruct and direct her?

2. Does the release and discharge of claims in the Legal Separation Agreement dated September 2, 2004 bar Plaintiff's claim.

3. Does the statute of limitations bar Plaintiff's claim?

VIII. DISCOVERY

The parties agree that portions of written discovery may be used as exhibits.

IX. ADDITIONAL PRETRIAL DISCOVERY

Defendant is taking the deposition of Dr. Patrick Cahill on February 20, 2004 pursuant to the Notice of Deposition on file herein.

X. STIPULATIONS

There are no stipulations of record at present.

XI. DETERMINATION OF LEGAL ISSUES IN ADVANCE OF TRIAL

Plaintiff:

None anticipated.

Defendants:

Admissibility of Evidence with respect to Ovine Ecthyma Vacine exposure caused by a third party which Robert Nelson had no duty to supervise pursuant to this Courts Order dated January 13, 2004.

XII. ADDITIONAL ISSUES

None .

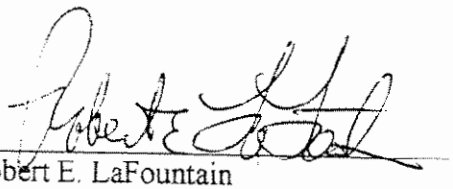
XIII. TRIAL

Trial is set for 10 March as case number _ at 9:00 o'clock a.m.

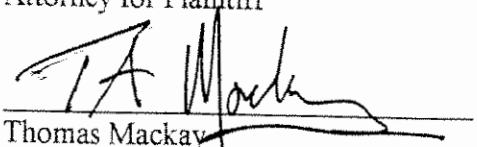
It is estimated that the case will require three (3) days for trial.

The case is set to try before the Court with a jury.

IT IS HEREBY ORDERED that this Pretrial Order shall supercede the pleadings and govern the course of the trial of this cause, unless modified to prevent injustice.



Robert E. LaFountain
Attorney for Plaintiff



Thomas Mackay
Attorney for Defendant

MONTANA SIXTEENTH JUDICIAL DISTRICT COURT, CUSTER COUNTY

M. ELIZABETH NELSON,	Cause No. DV 98-21580
Plaintiff,	Judge Gary L. Day
-vs-	**SCHEDULING ORDER**
ROBERT Y. NELSON,	
Defendant.	

Pursuant to a hearing held on July 23, 2003 and good cause appearing the Scheduling Order dated the 22nd day of October, 2002 shall be modified and amended to allow Defendant to conduct additional discovery as necessary and the Scheduling Order shall be amended in accordance with Rule 16(b) M.R. Civ. P., with the Court setting following deadlines in the above captioned case:

1. On or before October 1, 2003 all additional discovery undertaken by Defendant must be completed.

2. On or before October 15, 2003 all Motions must be filed with the Court except Motions *in limine*.

2. Mediation in this matter shall be concluded prior to November 15, 2003. If the parties cannot agree to a mediator they may apply to the Court for selection of a mediator.

3. On the 2nd day of February, 2004 a pre-trial conference will be held at 1:30 o'clock p.m. in the Custer County Courthouse, Miles City, Montana, at which time the Court

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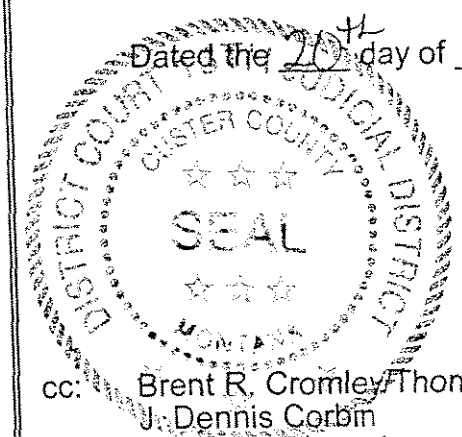
will hear pre-trial Motions. All counsel must attend, specifically counsel who intend to try the case. If no Motions are to be heard and there is a signed pre-trial Order, counsel may arrange to conduct the conference by telephone. Pending Motions for Summary Judgment will not stay discovery. At the pre-trial conference, counsel shall be prepared to discuss all matters set forth under rule (16c, M.R. Civ. P.)

4. Trial is set for the 10th day of MARCH, 2004 starting at 9.00 o'clock A.m. in the Custer County Courthouse, Miles City, Montana. Trial is expected to last three (3) days. On the first day of trial, counsel shall be present in chambers at 8:30 o'clock a.m.

All remaining items on the Scheduling Order dated October 22, 2002 shall remain unchanged.

Dated the 20th day of AUGUST, 2003.



Gary L. Day, District Judge

cc: Brent R. Cromley/Thomas A. Mackay
J. Dennis Corbin
Robert LaFountain

MONTANA SIXTEENTH JUDICIAL DISTRICT COURT, CUSTER COUNTY

M. ELIZABETH NELSON,

Plaintiff,

-vs-

ROBERT Y. NELSON,

Defendant.

Cause No. DV 98-21580
Judge Gary L. Day

ORDER GRANTING DIRECTED VERDICT AND VERDICT

This matter came on for trial beginning March 10, continuing to March 11, 2004. At the time that Plaintiff called her first expert witness, Richard A. Nelson, M.D., Defendant moved *in limine* to exclude any expert opinion testimony from Plaintiff's expert witnesses concerning the cause and effect between any exposure of Plaintiff to herbicides, insecticides and pesticides and Plaintiff's illness. The basis of the motion was the failure of Plaintiff to properly disclose expert testimony and opinions as required by this Court's Scheduling Order of October 22, 2002, and as required by Rule 26(b)(4)(A)(i), Montana Rules of Civil Procedure, with respect to the herbicides, insecticides and pesticides. The Court, after hearing the arguments of counsel and reviewing the documents presented during argument, granted that motion.

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Defendant then moved that a directed verdict be entered in favor of the Defendant on the grounds that, based upon the allegations of Plaintiff in the Final Pretrial Order and the remaining evidence proposed in the Final Pretrial Order, the evidence of the Plaintiff was not sufficient, as a matter of law, to entitle Plaintiff to recover against Defendant. Counsel for Plaintiff stated in open court that without the expert testimony, the Plaintiff could not establish causation. The Court, after hearing the arguments of counsel and reviewing the record, granted that motion.

IT IS THEREFORE ORDERED that a verdict be, and the same hereby is, entered in favor of the Defendant, and against the Plaintiff.

Order Dated this 16th day of March, 2004.

GARY L. DAY, District Judge

DISTRICT COURT 16TH JUDICIAL DISTRICT CUSTER COUNTY MONTANA SEAL

cc: Robert E. LaFountain
J. Dennis Corbin
Brent R. Cromley/Thomas A. Mackay

MONTANA SIXTEENTH JUDICIAL DISTRICT COURT, CUSTER COUNTY

M. ELIZABETH NELSON, Plaintiff, -vs- ROBERT Y. NELSON, Defendant.	Cause No. DV 98-21580 Judge Gary L. Day **JUDGMENT**

This Court having directed a verdict in favor of the Defendant and against the Plaintiff, and the Defendant being thereby entitled to judgment;

IT IS ORDERED AND ADJUDGED that Plaintiff take nothing by this action against Defendant, and that Defendant recover Defendant's costs of suit against Plaintiff, taxed at $ 1375.55.

Dated this 19th day of March, 2004.

GARY L. DAY

GARY L. DAY, District Judge

cc: Robert E. LaFountain
J. Dennis Corbin
Brent R. Cromley